UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/870,127	05/29/2001	Adnan Asar	KEYNP007	6508

26541 7590 10/05/2004

RITTER, LANG & KAPLAN
12930 SARATOGA AE. SUITE D1
SARATOGA, CA 95070

EXAMINER	
MAURO JR, THOMAS J	
ART UNIT	**PAPER NUMBER**
2143	

DATE MAILED: 10/05/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/870,127	ASAR ET AL.	
	Examiner	Art Unit	
	Thomas J. Mauro Jr.	2143	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *29 May 2001*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-51* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-51* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *29 May 2001* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date *20010622*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

1. Claims 1-51 are pending and are presented for examination. A formal action on the merits of claims 1-51 follows.

Double Patenting

2. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

3. Claims 1, 5, 15, 16, 17 and 19 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 6, 7, 10, 11 of copending Application No. 09/475,765. Although the conflicting claims are not identical, they are not patentably distinct from each other because both recite a method with similar steps for measuring performance information of a transaction, i.e. accessing a webpage, over the Internet.

For example, claim 1 of the instant application and claim 1 of application No. 09/475,765 recites a method of connecting a data acquisition client to a network, sending a request for the resource, receiving the resource in response, collecting performance measurements and sending

the performance measurements to storage. Claim 1 of the instant application, however, recites addition wherein the resource is streaming media. Streaming media is a type of data which is notoriously well-known on the Internet. It therefore, would have been obvious to a person of ordinary skill in the art at the time the invention was made to incorporate streaming media as the data type in order to provide performance measurements for a different, yet performance crucial, type of data resource. Similarly, claims 5, 15, 16, 17 and 19 of the instant claims and claims 6, 7, 10 and 11 of co-pending Application No. 09/475,765 recite similar limitations.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

5. Claims 1-5, 7-12, 14-18, 20-21, 28-31, 35-41, 43-47 and 51 are rejected under 35 U.S.C. 103(a) as being unpatentable over Boss et al. (U.S. 6,157,618) in view of Shastri (USS 2002/0065922).

Regarding claim 1, Boss teaches a method of measuring performance over a network, the method comprising:

connecting a data acquisition agent to the network **[Boss -- Col. 3 lines 34-39 and lines 44-67 and Col. 4 lines 1-9 and lines 34-41 – Data gathering clients, i.e. acquisition agents, are connected to the network to collect performance data]**;

sending a request from the data acquisition agent to a source connected to the network **[Boss -- Figure 8, Col. 3 lines 62-65 and Col. 6 lines 13-19 – Data gathering clients access sites, i.e. servers, to obtain performance parameter values indicative of the experience one has at a particular site]**;

receiving data in response to the request at the data acquisition agent **[Boss -- Col. 3 lines 62-65 and Col. 6 lines 12-21 – Site is accessed and information is downloaded, i.e. received, by the data gathering client]**;

collecting performance measurements for the data **[Boss -- Figure 8, Col. 6 lines 15-21 and Col. 7 lines 32-54 – Performance parameter values are obtained from the request]**; and

sending the performance measurements to a storage device **[Boss -- Col. 9 lines 10-19, Col. 12 lines 52-59 – Performance parameter values are sent to the UserMon server to be stored in a log, i.e. storage device]**.

Boss fails to explicitly teach requesting and receiving streaming media in order to measure performance values.

Shastri, however, discloses a system for collecting and processing performance data received in response to requesting and receiving streaming multimedia media **[Shastri -- Page 1 paragraph [0011], page 3 paragraph [0036] and pages 4-5 paragraphs [0038-0040] and [0048]]**.

Both Boss and Shastri are concerned with collecting performance information through accessing a site and downloading contents.

Therefore, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to incorporate the requesting and receiving of streaming media to collect performance values, as taught by Shastri into the invention of Boss, in order to determine the consistency of performance information over longer periods of time than just downloading web pages which will provide the user with a better overall indication of the performance of a site/server.

Regarding claims 2-4, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 1 above, including wherein the media comprises audio (claim 2), video (claim 3) and audio/video (claim 4) **[Shastri -- Page 1 paragraph [0004] and page 3 paragraph [0030] – Streaming media can be audio, video or a combination of audio and video]**.

Regarding claim 5, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 1 above, including sending a list of target media to the data acquisition agent **[Boss -- Col. 5 lines 4-27 and lines 40-52 – Instruction files contains a list of target sites for the data gathering client to access]**.

Regarding claims 7 and 8, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 1 above, including collecting measurements of initial connection and redirection times (claim 7) **[Boss -- Col. 11 lines 49-67 – Performance measurements**

collected include TimeforRedirects and ConnectTargetTime] and number of redirects (claim 8) **[Boss -- Col. 11 lines 43-48 – NumberOfRedirects]**

Regarding claims 9 and 11, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 1 above, including collecting packet (claim 9) and frame (claim 11) information **[Boss -- Col. 6 lines 12-21, Col. 11 lines 1-67 and Shastri -- Page 4 paragraph [0040] – All performance parameter values received are broadly considered a form of packet/frame information]**.

Regarding claim 10, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 1 above, including collecting rebuffer/buffer information **[Shastri -- Page 4 paragraph [0040] – Buffer rate information is received to further provide performance information to the system of Boss]**.

Regarding claim 12, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 1 above, including collecting bandwidth information **[Boss -- Col. 11 lines 59-61 and Shastri -- Pages 4-5 paragraph [0048] Bandwidth, i.e. ConnectSpeed, information is collected as a statistic]**.

Regarding claim 14, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 1 above, including collecting information identifying errors **[Shastri --**

Page 4 paragraph [0040] – Information containing packet loss and late packets, i.e. errors, is obtained as part of QoS statistics].

Regarding claims 15 and 16, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claims 1 and 15 above respectively, including wherein the network is the Internet (claim 15) **[Boss -- Col. 3 lines 27-33 – Performance is measured over the Internet]** and the source is a web server (claim 16) **[Boss -- Col. 3 lines 49-67 – Col. 4 lines 1-20 – Web pages are obviously stored and accessed from web servers and therefore are implicitly taught]**.

Regarding claim 17, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 1 above, including connection a plurality of data acquisition agents to the network at a plurality of locations **[Boss -- Col. 3 lines 49-67 – Col. 4 lines 1-30 – Data gathering clients are distributed across different geographic locations]**.

Regarding claim 18, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 17 above, including wherein each of the data acquisition agents include an internal clock coordinated with the other data acquisition/gathering clients clocks **[Boss -- Col. 12 lines 43-51 and Col. 13 lines 27-32 – Greenwich Mean Time (GMT) is used to synchronize Internet querying with the clocks of the various data gathering clients]**.

Regarding claim 20, Boss teaches the invention substantially as claimed but fails to explicitly teach determining a stream quality rating based on performance information. Shastri, however, discloses a system for collecting and processing performance data received in response to requesting and receiving streaming multimedia media **[Shastri -- Page 1 paragraph [0011], page 3 paragraph [0036] and pages 4-5 paragraphs [0038-0040] and [0048]]** and furthermore determining an overall QoS rating value for that particular content providing server **[Shastri -- Page 5 paragraph [0052]]**.

Both Boss and Shastri are concerned with collecting performance information through accessing a site and downloading contents.

Therefore, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to incorporate the determining an overall QoS rating value for that particular content providing server, as taught by Shastri into the invention of Boss, in order to provide the user with a real-time rating of a server to help them determine if content can best or most efficiently be accessed from a given server.

Regarding claim 21, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 20 above, including wherein the rating is based on startup, audio and video scores **[Shastri -- Pages 4-5 paragraphs [0040], [0048] and [0052] – Rating is comprised of average of all overall values, including that of data transfer rate, i.e. startup score, retained and lost video frames, i.e. video score, and decompression rate, i.e. audio score, as all statistics relate to both audio and video information]**.

Regarding claim 28, Boss teaches the invention substantially as claimed, a computer program product which includes a computer readable medium that stores said computer codes **[Boss -- Col. 17 lines 27-67 – Col. 18 line 1 – Program modules are stored on a hard disk, i.e. computer readable medium]**. The remaining limitations of claim 28 are similar to the method claimed in claim 1 above. They have similar limitations; therefore, claim 28 is rejected under the same rationale.

Regarding claim 29, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 28 above, wherein the computer readable medium is a hard drive **[Boss -- Col. 17 lines 64-67]**.

Regarding claim 30, this is a system claim corresponding to the method claimed in claim 1 above. It has similar limitations; therefore, claim 30 is rejected under the same rationale.

Regarding claim 31, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 30 above including wherein the data gathering client includes a media player **[Shastri -- Page 1 paragraph [0004] and page 3 paragraphs [0032-0036] – It is required that if streaming media is being monitored under performance, there is a player involved to view the media]**.

Regarding claims 35, 36-41 and 43-47, these are system claims corresponding to the method claimed in claims 14, 7-12, 15-17 and 20-21 above respectively. They have similar limitations; therefore, claims 35, 36-41 and 43-47 are rejected under the same rationale.

Regarding claim 51, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 30 above, including wherein the agent, i.e. data gathering client, temporarily stores the collected performance measurements **[Boss -- Figure 10 and Col. 8 lines 10-25 – Local log file on data gathering client stores obtained performance measurements]**.

6. Claims 6, 19, 25-27 and 32-34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Boss et al. (U.S. 6,157,618) and Shastri (USS 2002/0065922), as applied to claims 1, 5, 30 and 32 above respectively, in view of Landan (U.S. 6,449,739).

Regarding claim 6, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 5 above, but fail to explicitly teach sending a schedule for the requesting the targets.

Landan, however, discloses a monitoring system for measuring web-based performance which includes the ability to assign execution schedules for monitoring servers at specific times/days, etc **[Landan -- Figure 1, Abstract, Col. 5 lines 12-64 and Col. 6 lines 21-29]**.

Both Boss-Shastri and Landan are concerned with monitoring web-based server performance.

Therefore, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to incorporate the sending of a monitoring execution schedule, as taught by Landan into the invention of Boss-Shastri, in order to give users more control to decide when performance measurements should be taken, i.e. based upon high loads or peak times.

Regarding claim 19, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 1 above, but fail to explicitly teach displaying the performance measurements on a website.

Landan, however, discloses a monitoring system for measuring web-based performance which includes displaying the measurements on a website **[Landan – Abstract and Col. 8 lines 27-29]**. Both Boss-Shastri and Landan are concerned with monitoring web-based server performance. Therefore, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to incorporate the displaying of measurement information on a webpage, as taught by Landan into the invention of Boss-Shastri, in order to real-time online access to measurement information from any computer or location.

Regarding claims 25-27, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 1 above, but fail to explicitly teach collecting the measurements for a predetermined period of time (claim 25), predetermined intervals (claim 26) and at specified times (claim 27).

Landan, however, discloses a monitoring system for measuring web-based performance which allows scheduling the execution of measurements **[Landan -- Figure 1, Abstract, Col. 5 lines**

12-64 and Col. 6 lines 21-29] for either a predetermined period of time, predetermined intervals or at specified times **[Landan -- Abstract, Figure 9 and Col. 11 lines 1-40 – Predetermined time periods can be set up, i.e. during weekdays, predetermined intervals, i.e. every 30 minutes, or specified time, i.e. from a certain hour to a stop hour, such as what is shown in Figure 9]**.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to incorporate the collecting of measurements during a predetermined period of time, predetermined interval or at specified times, as taught by Landan into the invention of Boss-Shastri, in order to provide the user with a variety of monitoring tools so as to allow for customized measuring and scheduling during certain "interested" time periods.

Regarding claim 32, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 30 above, including sending a preference file containing a list of target sites to be measured to the data gathering client **[Boss -- Col. 5 lines 4-27 and lines 40-52 – Instruction files contains a list of target sites for the data gathering client to access]**, however, fails to teach a schedule for measuring performance on the sites.

Landan, however, discloses a monitoring system for measuring web-based performance which includes the ability to assign execution schedules for monitoring servers at specific times/days, etc **[Landan -- Figure 1, Abstract, Col. 5 lines 12-64 and Col. 6 lines 21-29]**.

Both Boss-Shastri and Landan are concerned with monitoring web-based server performance. Therefore, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to incorporate the sending of a monitoring execution schedule, as taught by

Landan into the invention of Boss-Shastri, in order to give users more control to decide when performance measurements should be taken, i.e. based upon high loads or peak times.

Regarding claim 33, Boss-Shastri-Landan teach the invention substantially as claimed, as aforementioned in claim 32 above, including a dispatch module operable to read the preference/instruction file and invoke a measurement application **[Boss -- Col. Col. 5 lines 4-52 and Col. 7 lines 55-67 – Col. 8 lines 1-65 – Software system residing on data gathering client contains software modules which invoke client to read/access preference/instruction file and to cause measurements to be obtained via an application]**.

Regarding claim 34, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 30 above, including storing the data collected **[Boss -- Col. 9 lines 10-19, Col. 12 lines 52-59 – Performance parameter values are sent to the UserMon server to be stored in a log, i.e. storage device]**, however, fails to teach storing the data in a database. Landan, however, discloses storing the performance data in a centralized results database **[Landan -- Col. 8 lines 27-45]**.

Databases were notoriously well-known data structures at the time the invention was made for storing data in a structured form.

Therefore, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to incorporate the storing of data collected in a database, as taught by Landan into the invention of Boss-Shastri, in order to provide a well-known data structure for organizing and storing various types of information.

7. Claims 13 and 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Boss et al. (U.S. 6,157,618) and Shastri (USS 2002/0065922), as applied to claims 1 and 30 above respectively, in view of Fitch et al. (U.S. 6,647,389).

Regarding claim 13, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claim 1 above, but fail to explicitly teach identifying the codec of a media. Fitch, however, discloses a system and method for evaluating media streams over a network which includes determining the codec used in the stream **[Fitch -- Col. 2 lines 25-44 and Col. 7 lines 23-30]**.

Both Boss-Shastri and Fitch are concerned with evaluating and determining characteristics of data and streams over the Internet.

Therefore, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to incorporate the determining of codec information, as taught by Fitch into the invention of Boss-Shastri, in order to provide further information regarding the stream in order to evaluate the type and performance of a given site/stream.

Regarding claim 42, this is a system claim corresponding to the method claimed in claim 13 above. It has similar limitations; therefore, claim 42 is rejected under the same rationale.

8. Claims 22-24 and 48-50 are rejected under 35 U.S.C. 103(a) as being unpatentable over Boss et al. (U.S. 6,157,618) and Shastri (USS 2002/0065922), as applied to claims 21 and 22 and 47 and 48 above respectively, in view of Gordon et al. (U.S. 6,584,153).

Regarding claims 22-24, Boss-Shastri teach the invention substantially as claimed, as aforementioned in claims 21 and 22 above respectively, including audio and video streams and their respective scores **[Shastri -- Pages 4-5 paragraphs [0040], [0048] and [0052] – Rating is comprised of average of all overall values, including that of data transfer rate, i.e. startup score, retained and lost video frames, i.e. video score, and decompression rate, i.e. audio score, as all statistics relate to both audio and video information],** but fails to explicitly teach having scores based on rendering/encoding (claim 22) and wherein the scores are based on bandwidth data (claims 23-24).

Gordon, however, discloses a system which provides bandwidth information of audio/video rendering/encoding levels **[Gordon -- Col. 24 lines 47-62]**.

Boss-Shastri do, however, disclose a system for evaluation stream QoS quality ratings based upon a given set of criteria.

Therefore, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to incorporate the rendering/encoding information of bandwidth, as taught by Gordon into the invention of Boss-Shastri, in order to provide more detailed information to produce a more accurate and realistic stream QoS score.

Regarding claims 48-50, these are system claims corresponding to the method claimed in claims 22-24 above. They have similar limitations; therefore, claims 48-50 are rejected under the same rationale.

Conclusion

9. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

- Merriam (U.S. 6,587,878) discloses a system for measuring performance in a network system by probing various locations within a network.

- Killian (U.S. 6,438,592) discloses a system for monitoring performance on the Internet using a monitoring server.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Thomas J. Mauro Jr. whose telephone number is 703-605-1234. The examiner can normally be reached on M-F 8:00a.m. - 4:30p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David A. Wiley can be reached on 703-308-5221. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

TJM
September 30, 2004

DAVID WILEY
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 2100